Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

SHERMAN SMITH AND TRACY SMITH,

Petitioners,

v.

HOUSTON OILERS, INC. d.b.a.
THE HOUSTON OILERS,
FLOYD REESE AND STEVE WATTERSON,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Sherman Smith's and Tracy Smith's intentional infliction of emotional distress claim arising out of Respondents' blackballing threats was remanded by the United States District Court to Texas state court because the claim was not inextricably intertwined with the collective bargaining agreement governing their employment relationship with the Houston Oilers professional football team.

The lower court reversed the district court's remand, holding that the blackballing claim should have been dismissed on preemption grounds under *San Diego Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959). The question presented here is:

Did the actions of Sherman Smith and Tracy Smith, in refusing to accept an early termination of their contract constitute "concerted activity" such that their blackballing claims are preempted under *Garmon*?

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PETITION FOR WRIT OF CERTIORARI

Sherman Smith and Tracy Smith (collectively the "Players") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 28, 1996, in order to resolve the conflict between the Fifth Circuit and this court on an important federal question.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is found at *Smith v. Houston Oilers, et al.*, 87 F.3d 717 (5th Cir. 1996). It is reprinted in Appendix A hereto ("App. A") at page A-1.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on June 28, 1996. Thus, jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

29 U.S.C. § 157 provides:

> Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives

> of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(b) provides:

> (b) It shall be unfair labor practice for a labor organization or its agents –
>
> > (1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 157 of this title . . .

STATEMENT OF THE CASE

On September 12, 1994, the Players filed a lawsuit in state district court in Harris County, Texas against the Houston Oilers, the Oilers' General Manager, Floyd Reese, and the Oilers' strength coach, Steve Watterson (collectively the "Oilers" unless some distinction is necessary). The Players alleged that certain actions taken by the Oilers, in an effort to force them to release the Oilers from player contracts, constituted intentional infliction of emotional distress, extortion, duress, coercion, assault and battery and unlawful blackballing from professional football. The Oilers removed the case to the United States District Court claiming federal question jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. After removal, the Oilers filed a motion to

dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The gist of the Oilers' motion to dismiss was that the allegations in the Players' pleadings required interpretation of the parties' rights and obligations under the collective bargaining agreement between the National Football League and the National Football League Players Association.

The district court dismissed the Players' claims for coercion, duress, extortion, assault and battery. The court remanded one claim to state court – intentional infliction of emotional distress caused by blackballing.

The Fifth Circuit affirmed the district court's order with respect to the dismissed claims. The court below, however, reversed the district court's remand of the intentional infliction of emotional distress from blackballing claim, holding that, on preemption grounds, the National Labor Relations Board was the proper tribunal to hear the blackballing case because the Oilers' conduct was in response to "concerted activity." (App. A-12-13)

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Improperly Applies This Court's Holdings In *NLRB v. City Disposal Systems, Inc.* and *San Diego Trades Council v. Garmon* Regarding What Constitutes "Concerted Activity" And the Resulting Requirement That Blackballing Claims For This Activity Be Exclusively Heard By The National Labor Relations Board.

Section 7 of the LMRA, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8, 29 U.S.C. § 158 provides that: "it shall be an unfair labor practice for an employer –

> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [§ 7 of the NRA]."

29 U.S.C. § 158(d).

In *San Diego Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959), this court held that "[w]hen an activity is arguably subject to § 7 and § 8 of the [NLRA], the states as well as the federal courts must defer to the exclusive

competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245, 79 S.Ct. at 780. In other words, if the Players' refusal to accept a buyout of their contracts could be arguably subject to § 7 ("concerted activity") and § 8 of the NLRA, then any dispute relating to that refusal would be preempted. The Oilers argue that jurisdiction relating to the players' blacklisting claim is controlled by a line of blacklisting cases which follow *Garmon* and require NLRB jurisdiction. Specifically, the Oilers and the court below rely on *NLRB v. City Disposal System, Inc.*, 465 U.S. 822, 104 S.Ct. 1505 (1984), for this proposition. Certiorari is appropriate here because the court below misapplied *Garmon* and *City Disposal* in holding that Tracy's and Sherman's actions constituted "concerted activity."

In *City Disposal*, this court held that an *individual's* honest and reasonable invocation of a collectively bargained right constitutes "concerted activity" under 29 U.S.C. § 157. *City Disposal*, 465 U.S. at 832-33, 104 S.Ct. 1511-1512 (emphasis supplied). In that case, the plaintiff refused to drive a truck that he knew was unsafe. The collective bargaining agreement specifically provided that "the Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with safety appliances." *Id.* at 824-25, 1506-07. Nonetheless, the plaintiff was fired. *Id.*

The Players do not take issue with the fact that an individual invocation of collectively bargained rights would be "concerted activity." Rather, the Players argue that they were not trying to invoke any right arising out

of any collective bargaining agreement. The threat to blacklist, as alleged by the Players, emanated from their decision to turn down the Oilers' offer of a nominal settlement amount in return for an agreement to terminate their contracts. The conduct in no way relates to union or "concerted activity."

Unlike in *City Disposal*, where the employee was relying on a specific collective bargaining provision to deny doing what he otherwise was required, the Players did not deny to do anything they were otherwise required to do. For the activity to cross the threshold and become "concerted," the Players' decision not to accept the settlement offer, at the very least must "refer to a reasonably perceived violation of the collective bargaining agreement. . . . " *City Disposal*, 465 U.S. at 840, 104 S.Ct. at 1515. There is no such reasonable reference in this case. Consequently, the Players were not engaged in "concerted activity" and their claims accordingly are not subject to *Garmon* preemption.

As *Garmon* points out, preemption does not exist where the conduct is only of "peripheral concern" to the NLRA or "touches on interests . . . deeply rooted in local feeling or responsibility." *Garmon*, 359 U.S. at 243-44, 79 S.Ct. at 778-79. The conduct in this case, blackballing for not accepting a settlement offer, could at most only be a peripheral concern to the NLRA.

The court below incorrectly concluded that the Players' claims were preempted. (App. A-13) It did so without any reference to a collective bargaining right being invoked such that the Players were engaged in "concerted activities." The district court correctly

remanded this claim to Texas state court and the court below improperly reversed that decision.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Sherman SMITH; Tracy Smith,
Plaintiffs-Appellants
Cross-Appellees,

v.

HOUSTON OILERS, INC., doing business as The Houston Oilers; Floyd Reese; Steve Watterson, Defendants-Appellees, Cross-Appellants.

No. 95-20073.
United States Court of Appeals,
Fifth Circuit.

June 28, 1996.

Professional football players brought suit against team and team officials in state court, alleging state law claims of coercion, duress, extortion, assault and battery, and intentional infliction of emotional distress. Claims were based on allegations that after players refused offer of termination pay, they were required to participate in abusive rehabilitation program under threats of being dismissed from team and blackballed from other teams in professional football league. After removal of claims, the United States District Court for the Southern District of Texas, David Hittner, J., dismissed state claims based on abusive rehabilitation program on ground that claims were preempted by federal labor law, but remanded to state court related state claims of intentional infliction of emotional distress to extent that claims arose from allegations of threatened blackballing. Players appealed, and defendants cross-appealed remand order. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held

that: (1) because underlying labor dispute over termination pay could not be divorced from team's conduct in forcing players to choose between terms of termination and participating in excessively demanding rehabilitation program, resolution of claims was too dependent on analysis of collective bargaining agreement (CBA) to escape preemption; (2) players were not entitled to pursue preempted claims in state court under exception to federal preemption where defendant's "outrageous conduct" is merely a peripheral concern of federal law; and (3) claims based on allegations of threatened blackballing were unfair labor practice claims which were preempted by the National Labor Relations Act (NLRA).

Affirmed in part; vacated in part and remanded.

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Philip P. Sudan, Jr., Elza Vance Bullock, Jr., Ryan & Sudan, Houston, TX, Steve Underwood, Houston, TX, for Defendants-Appellees-Cross-Appellants.

Appeals from the United States District Court for the Southern District of Texas.

Before POLITZ, Chief Judge, and HIGGINBOTHAM and SMITH, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Sherman Smith and Tracy Smith sued the Houston Oilers and members of the Oilers' staff, alleging that the defendants required their participation in an abusive

rehabilitation program under threats of being dismissed from the Oilers and blackballed from other teams in the National Football League. The district court dismissed the state claims based on the abusive rehabilitation program on the ground that those claims were preempted by federal labor law, but it remanded to state court related state claims of intentional infliction of emotional distress to the extent that those claims arose from the allegations of threatened blackballing. The players appeal the dismissal, and the Oilers cross-appeal the order remanding to state court.

We conclude that all claims are preempted by federal labor law. We affirm the dismissal, vacate the order remanding to state court, and remand with instruction to dismiss those claims as well.

I.

Sherman Smith and Tracy Smith alleged the following facts, and we accept them as true in the present posture of the case: Sherman Smith and Tracy Smith each signed a one-year contract to play professional football for the Houston Oilers. During preseason training camp in the summer of 1994, Sherman broke his thumb and Tracy tore a leg muscle. These injuries prevented them from playing, and they were placed in a routine rehabilitation program with other injured players. In the first week of required player cuts, however, the Oilers sought to dismiss Sherman and Tracy. But since the National Football League prohibits teams from terminating football players while they are recovering from football-related injuries, the Oilers offered to settle Sherman's and

Tracy's contracts for a "meager" sum if they left voluntarily. Sherman and Tracy rejected these offers.

According to the Smiths' allegations, Floyd Reese and Steve Watterson of the Oilers responded by compelling Sherman and Tracy to submit to severe abuse in a phony "rehabilitation" program designed to coerce them into leaving the team. The abuse, they allege, included: reduction of rehabilitation treatment previously allowed, such as stretching and ice treatment; sleep deprivation resulting from morning workouts beginning at 4:00 a.m. and evening workouts ending at 11:00 p.m.; strenuous exercise that far exceeded previous demands, including humiliating water-barrel-pulling exercises; veiled threats of dismissal for noncompliance with rehabilitation; intentional confusion as to workout schedules; and threats to blackball Sherman and Tracy from playing for other NFL teams in the future.

No other players participated in this abusive program. Three days after Sherman and Tracy began the program, Sherman collapsed during a 4:00 a.m. workout and was taken to the hospital. Later that day, Tracy complained to the NFL Players Association, after which the Oilers ceased the program.

Sherman Smith and Tracy Smith sued the Houston Oilers, Reese, and Watterson in Texas state court, alleging state law claims of coercion, duress, extortion, assault and battery, and intentional infliction of emotional distress. The Oilers removed to federal court on the ground that the claims were preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The Oilers then moved to dismiss all claims under Fed.R.Civ.P. 12(b)(6),

arguing that their resolution turned on an analysis of the collective bargaining agreement between the NFL and the players union, and that the claims therefore had to be resolved pursuant to the CBA's arbitration provisions. The players moved to remand the case to state court, arguing that the district court lacked subject matter jurisdiction over their state-law claims.

The district court dismissed the claims based on the abusive rehabilitation program, agreeing with the Oilers that those claims were preempted by LMRA § 301 because their resolution would require analysis of the CBA. The court remanded to state court, however, the players' claims of intentional infliction of emotional distress based on alleged blackballing threats, concluding that blackballing threats "could not possibly be sanctioned by any labor contract." The players appeal the dismissal of their non-blackballing claims. The Oilers cross-appeal the order remanding the players' claims of infliction of emotional distress based on threatened blackballing.

II.

The players bring two arguments. First, the players contend that the district court erred in holding that their claims of abuse were "inextricably intertwined" with the CBA and hence preempted by § 301 of the LMRA. Second, in the alternative, they argue that the district court erred in deciding that the Oilers' alleged conduct was not sufficiently outrageous to override § 301 preemption under *Farmer v. United Bhd. of Carpenters & Joiners*, 430

U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). We conclude that the district court properly dismissed the claims based on the allegedly abusive rehabilitation program.

A.

Section 301 of the LMRA provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185. The Supreme Court has held that LMRA § 301 preempts state-law claims that are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 1916, 85 L.Ed.2d 206 (1985). Accordingly, "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles – necessarily uniform throughout the nation – must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410 (1988).

In considering a claim of intentional infliction of emotional distress, we have stated that "the question of preemption turns on whether the conduct upon which the claim is grounded is governed by the CBA. If the agreement would not condone the activity, there is no preemption. If the conduct arises out of activities covered in the

agreement, however, courts generally hold that the emotional distress claim is preempted." *Baker v. Farmers Elec. Co-op., Inc.*, 34 F.3d 274 (5th Cir.1994). Thus, on this view, LMRA preemption typically does not occur "where the allegedly tortious conduct could not have been sanctioned by the CBA, for example in cases concerning assault and battery or sexual harassment." *Id.* at 281; *see Reece v. Houston Lighting & Power Co.*, 79 F.3d 485, 487 (5th Cir.1996) (concluding that LMRA § 301 preempted state-law claims of discrimination and intentional infliction of emotional distress because resolution of claims would require interpretation of CBA provisions on promotion, seniority, and training assignments).

The district court here concluded that LMRA § 301 preemption applied because the CBA authorized NFL teams to require players to participate in rehabilitation programs. The court explained:

> In the instant matter, most of the alleged tortious conduct revolved around the required participation by the players in a rehabilitation program. Rehabilitation programs are condoned by the CBA and the individual player contracts. For example, paragraph 8 of the player contract states that the player warrants he will maintain excellent physical condition. Article [VIII] of the CBA further provides that 'material failure to follow rehabilitation program prescribed by Club physician or trainer' can result in a maximum fine of $1,000. It is evident from these provisions that the underlying conduct of the team and the individual defendants could be permitted by the CBA. Accordingly, the Court determines that the causes of action which stem from the 'abusive' rehabilitation program are

> inextricably intertwined with the CBA and are therefore preempted by § 301.

The players do not dispute that the CBA at issue here permits NFL teams to require their players to participate in rehabilitation and conditioning programs. Rather, the players urge that the district court erred because the Oilers' demands in rehabilitation were so egregious that the CBA could not possibly have condoned them.

The players contend with considerable force that LMRA § 301 preemption generally does not apply to claims based on certain types of tortious conduct that a CBA could never condone, such as physical battery. But such inquiry into whether a CBA "condoned" a defendant's conduct is only a means for addressing the ultimate question whether "resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement." *Lingle* 486 U.S. at 405-06, 108 S.Ct. at 1881. Where the complained-of actions consist entirely of an employer's physical battery of an employee, there is no need for reference to a labor agreement; in such cases, it typically makes sense to say that, because the CBA at issue could not have condoned such conduct, resolution of the plaintiff's claim for battery does not depend on the meaning of the terms of the CBA. This comports with an underlying appreciation that the employer's physical attack on the employee is properly regarded as an issue of state law, not a matter of federal labor concern.

Here, however, the alleged misconduct cannot be separated from the underlying dispute between the players and the Oilers over the adequacy of the Oilers' offer of termination pay. That dispute is fundamentally a

labor dispute; indeed, the abuse complained-of by the players occurred only because they wanted to remain with a team that did not want them. There is no allegation that anyone from the Oilers' management or staff committed a direct act of physical violence against Sherman Smith or Tracy Smith. Rather, the abuse of the two players resulted from their compelled participation in an ostensible rehabilitation program under threats of termination or blackballing. The players could have avoided the abuse by refusing to participate. In sum, the complained of conduct was the Oilers' unreasonable negotiating position regarding termination, not any infliction of violence upon the two players.

The players could have complained to the league office earlier. The quick response to their complaint belies the effort to distance the dispute over contract rights and excessive workout schedules from the CBA. Indeed, since the labor dispute is at the heart of the players' complaints, we think that those complaints are not too peripheral a concern for the federal labor laws. In short, because we are persuaded that the underlying labor dispute over termination pay cannot be divorced from the Oilers' conduct in forcing the players to choose between the terms of termination and an excessively demanding rehabilitation program, we conclude that resolution of the players claims in this case of professional athletes is too dependent on an analysis of the CBA to escape § 301 preemption.

Another way of stating this is that we have here a case involving contract rights, not condoned violence. That is to say, players can legally consent to challenging workouts and rigorous rehabilitation sessions. Whether

the Oilers had a legal right to require the players either to endure the workouts or quit is therefore a question of contract law. As the contract at issue is a CBA, federal, not state, law governs.

B.

The players contend in the alternative that if their claims are otherwise preempted, they are nevertheless entitled to pursue their claims in state court under an exception to federal preemption where the defendants' "outrageous conduct" is merely a peripheral concern of federal law. *See Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). In *Farmer*, a union officer claimed intentional infliction of emotional distress under California law, alleging that other union officers had engaged in "outrageous conduct, threats, intimidation, and words," causing him "grievous mental and emotional distress as well as great physical damage." *Id.* at 301, 97 S.Ct. at 1064. In deciding whether the claim was preempted, the Supreme Court cautioned that "inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Id.* at 302, 97 S.Ct. at 1064; *see also San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44, 79 S.Ct. 773, 778-79, 3 L.Ed.2d 775 (1959) (emphasizing that preemption does not occur where conduct "was a merely peripheral concern of the [LMRA, . . . or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could

not infer that Congress had deprived the State of the power to act"). The Court concluded that the federal labor laws did not preempt the union officer's emotional-distress claim, explaining that "there is no federal protection for conduct on the part of union officers which is 'so outrageous that no reasonable man in a civilized society should be expected to endure it.' " *Id.* at 302, 97 S.Ct. at 1064.

We agree with the district court that the Oilers' alleged misconduct was not sufficiently outrageous to defeat preemption under *Farmer*. That is, since we think it necessary to refer to the CBA to determine the extent to which the Oilers' rehabilitation demands were *permissible*, it is likewise necessary to measure the *outrageousness* of their conduct by reference to what the CBA authorizes. *Cf. Reece*, 79 F.3d at 487 (holding that LMRA § 301 preempted plaintiff's claim of intentional infliction of emotional distress after observing that, "to evaluate whether [defendant's] conduct was 'outrageous,' the conduct must be measured against the CBA").

III.

The Oilers argue on cross-appeal that the district court erred in remanding to state court the players' claims of intentional infliction of emotional distress resulting from the Oilers' alleged blackballing threats. The Oilers contend that such claims based on allegations of threatened blackballing are claims of unfair labor practices, and as such are preempted by § 7 and § 8 of the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* Though the Oilers are asserting NLRA preemption for the

first time on appeal, we may consider the argument since NLRA preemption is an issue of subject matter jurisdiction. *See International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 389-93, 106 S.Ct. 1904, 1911-14, 90 L.Ed.2d 389 (1986).

We agree that NLRA §§ 7 and 8 preempt the players' claims of intentional infliction of emotional distress based on blackballing threats. Section 8(a) of the NLRA provides, in relevant part, that "[i]t shall be an unfair labor practice for an employer – (1) to interfere with, restraint [sic], or coerce employees in the exercise of the rights guaranteed in [NLRA § 7]." 29 U.S.C. § 158(a). Section 7 of the NLRA in turn states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157. "When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245, 79 S.Ct. at 780.

The players do not dispute that blackballing is an unfair labor practice proscribed by § 7 and § 8 of the NLRA; rather, they argue that because they did not engage in any "*concerted* activity" as contemplated by NLRA § 7, the NLRA does not govern the Oilers' blackballing threats, which were directed toward the players' non-concerted activity. This argument lacks merit. *See N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 840-41, 104 S.Ct. 1505, 1515-16, 79 L.Ed.2d 839 (1984) (holding that honest and reasonable invocation of collectively bargained right constitutes "concerted activity" under § 7 of NLRA). We conclude that § 7 and § 8 of the NLRA preempt the emotional-distress claims based on the Oilers' blackballing threats.

IV.

We AFFIRM the district court's dismissal of the plaintiffs' claims based on the abusive rehabilitation program. We VACATE and REMAND to the district court its order remanding to state court the claims of intentional infliction of emotional distress based on blackballing threats with instructions to dismiss those claims.